

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VALERIAN C. PAIS,	:	
OFFICER OF DOROTHEA LANCE, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1985	:	
through February 28, 1987.	:	

Petitioner, Valerian C. Pais, officer of Dorothea Lance, Inc., 78 Patrice Terrace, Williamsville, New York 14221, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1985 through February 28, 1987 (File No. 806711).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on January 10, 1990 at 10:45 A.M., with all briefs to be submitted by April 11, 1990. Petitioner appeared by David H. Franz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation had authority to assess petitioner herein under Tax Law § 1133(a) where such assessment is premised upon filed sales tax returns, accepted by the Division as correct, where the tax shown due on said returns had not been paid or had not been paid in full.

II. Whether petitioner is liable for the sales and use taxes due on behalf of Dorothea Lance, Inc. as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

On November 23, 1987, the Division of Taxation issued to petitioner, Valerian Pais, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$37,391.26 in tax due, plus penalty and interest, for the period March 1, 1985 through February 28, 1987. The notice advised petitioner as follows:

"You are liable individually and as officer of Dorothea Lance Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the law."

The assessment herein was based upon filed sales tax returns of Dorothea Lance, Inc. ("the corporation"), which returns were accepted as correct by the Division, but with respect to which payment of the tax shown due had not been made (or had not been made in full) by the corporation.

Dorothea Lance, Inc. was a subchapter S corporation formed in 1982. During the period at issue, the corporation's sole business activity was the operation of a bar/restaurant known as "Scruples" in Niagara Falls, New York. Scruples began operations in November 1982.

Petitioner and his wife came to the United States from Bombay, India in 1980 at the age of 67. Petitioner's four sons, Roy, Alan, Ivor and Lester Pais, had previously come to the United States to further their education and had later become involved in various restaurant businesses.

In 1978, petitioner's sons, Roy and Ivor Pais, went into business operating a Sizzler Restaurant franchise in the Buffalo area. Later, this franchise operation was dropped in favor of an independent operation known as Southfork Restaurant. Throughout the period at issue petitioner was employed by and received a salary from the Sizzler/Southfork restaurant operation. Petitioner worked at this restaurant on a daily basis.

In 1982, petitioner's son, Lester Pais, sought to start his own business. Specifically, Lester wanted to run a bar/restaurant/night club in the Rainbow Mall in Niagara Falls, New York. Lester was unable, however, to obtain bank financing for this venture. Lester therefore turned to his father (petitioner herein) for money necessary to start up his business. Petitioner subsequently provided his son Lester with \$75,000.00 to start up the business, which later

became known as Scruples. In exchange, petitioner received 75% of the stock of Dorothea Lance, Inc., the corporation that owned the Scruples operation. Petitioner was also named president of Dorothea Lance, Inc. It was understood between petitioner and his son Lester that petitioner would be reimbursed for his \$75,000.00 investment from corporate profits. The corporation never made a profit and petitioner never received any return on his \$75,000.00 investment.

Lester Pais was secretary-treasurer of the corporation and owned 25% of its stock. He was also general manager of Scruples and was in charge of day-to-day operations. Lester dealt with the corporation's creditors, including banks, and determined which creditors were to be paid. Lester also ordered beer, wine and liquor for the bar.

Ivor Pais was food manager of Scruples and was in charge of the food operation, including the ordering of food.

The corporation's sales tax returns were prepared by Lester Pais along with a corporate employee and were signed by Lester Pais.

Petitioner had no involvement in the day-to-day operations of Scruples. Petitioner was on the Scruples premises only on the occasion of its grand opening. He had no involvement in the hiring and firing of employees or the preparation of any tax returns. Except for signing a few checks for the corporation in Lester and Ivor's absence, petitioner had no involvement in the corporation's payment of its creditors. Petitioner did not receive a salary from the corporation.

Petitioner, along with sons Lester and Ivor, was an authorized signatory on the corporation's checking accounts. Petitioner signed checks for the corporation only in the absence of Lester or Ivor and only under exigent circumstances. Petitioner signed three or four checks on the corporation's behalf during the period at issue. One of the checks so signed by petitioner was a payment of sales taxes.

Petitioner considered himself an investor in Scruples. He did not advise his son Lester regarding the restaurant operation. His knowledge of the corporation's finances was limited to very general discussions with his sons as to how the business was doing. Petitioner was aware

that the corporation was operating at a loss from its inception.

Petitioner claimed a distributive share of the S corporation's ordinary losses on his personal income tax returns with respect to the period the corporation was active. On his 1983 personal income tax return, petitioner claimed \$11,441.00 in ordinary losses with respect to Dorothea Lance, Inc. With respect to the corporation's fiscal year ended November 30, 1982, petitioner received the benefit of \$26,750.00 in corporate losses, and for the fiscal year ended November 30, 1985, petitioner received the benefit of \$121,986.00 in corporate losses.

CONCLUSIONS OF LAW

A. Effective April 17, 1985, chapter 65 of the Laws of 1985 added subparagraph (B) to Tax Law § 1138(a)(3). This subparagraph authorizes the Commissioner of Taxation and Finance to determine the liability of an individual under Tax Law § 1133(a) in the same manner as where a return is not filed, or an incorrect return is filed (i.e., pursuant to Tax Law § 1138[a][1] and [2]). This subparagraph further provides that the Commissioner may make such a determination whether or not a return is filed, whether or not such return is incorrect or insufficient, or whether or not the tax shown to be due on the return has been paid. Finally, this subparagraph provides that the person assessed may petition the Division of Tax Appeals for a hearing on the assessment. Pursuant to Tax Law § 1138(a)(3)(B), then, the Division's assessment against petitioner was statutorily authorized.

B. Tax Law § 1133(a) imposes personal liability for taxes imposed, collected or required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director, or employee of a corporation...who as such officer, director or employee is under a duty to act for such corporation...in complying with any requirement of [Article 28]" (Tax Law § 1131[1]). Whether an individual is under a duty to act for a corporation with regard to its compliance with the requirements of Article 28 so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts (Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222,

413 NYS2d 862).

C. "The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interests in the corporation (citations omitted). The holding of corporate office does not in and of itself impose liability (citation omitted)." (Matter of Frank S. Constantino, Officer of Jordan Elevator Co., Inc., Tax Appeals Tribunal, September 27, 1990.)

D. Here, petitioner was president of the corporation and owned 75% of its stock. He was an authorized signatory on the corporation's checking accounts. He invested \$75,000.00 in the corporation.¹ He derived economic benefit from his stock ownership by the pass-through of the S corporation's ordinary losses. These facts compel the conclusion that petitioner had or could have had sufficient authority and control over the affairs of Dorothea Lance, Inc. such that he was under a duty to act for Dorothea Lance, Inc. in complying with the requirements of Article 28 of the Tax Law.

E. It is true, as petitioner notes, that he became involved with the corporation primarily because of his son's desire to run a business, that petitioner intended for his son to manage the business and that petitioner did not intend to become involved in the running of the business. These intentions, though firmly rooted in a desire to see his son succeed, do not serve to shed petitioner of his status as a responsible officer. By his status as majority shareholder, president and authorized signatory on checking accounts petitioner achieved de jure control of the corporation

¹It should be noted that, while petitioner contended that he "loaned" his son the \$75,000.00 to start up the business, such funds clearly constituted a capital contribution and not a loan. Petitioner, after all, received stock in exchange for his \$75,000.00 and not a promissory note. Moreover, while petitioner's son expressed an intent to repay petitioner's \$75,000.00, such repayments were to come out of corporate profits, a further indication that petitioner's initial investment was a contribution to capital and not a loan.

and thereby assumed a duty to act for the corporation in respect of its sales tax obligations. Petitioner's intent not to discharge that duty, and, in fact, to relinquish day-to-day control to his son, does not serve to absolve him of personal liability under Tax Law §§ 1131 and 1133 (see, Matter of William F. Martin, Officer of Rainbow Food Marts, Inc., Tax Appeals Tribunal, July 20, 1989, confirmed 558 NYS2d 239).

F. The petition of Valerian C. Pais, officer of Dorothea Lance, Inc., is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated November 23, 1987, is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE